U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner has since filed three motions to reconsider. The AAO dismissed the first two motions. The third motion is currently before the AAO. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a biology teacher at the . The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO, in dismissing the appeal, discussed the merits of the petition at length and determined that the director had correctly denied the petition. The AAO subsequently dismissed the petitioner's first two motions.

On motion, the petitioner submits a statement and several exhibits.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
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> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The director's only adverse finding was that the petitioner had not established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 26, 2008. The director denied the petition on July 13, 2009, stating that the petitioner had established the intrinsic merit of science education, but had not shown that the benefit from his intended work has been or will be national in scope, or that he had a past record of influential achievements that would justify projections of future benefit to the United States. The petitioner appealed, submitting an attorney's brief and additional evidence.

The AAO dismissed the appeal on November 17, 2010, stating that the petitioner had not shown that his impact has extended or will extend beyond the students whom he personally instructs at The AAO stated that the success the petitioner's own students "does not establish the petitioner's influence on other science educators." The AAO further stated:

> [T]he petitioner was a panel member of the Kenya between 1984 and 1989. This service included developing the secondary education biology curriculum, providing orientation for teachers on the new curriculum and developing support materials for the curriculum. The petitioner, however, does not indicate that he will be participating in a in the United States. Thus, while his past service on such a in Kenya is notable, it does not demonstrate his future potential for a national impact in the United States.

The petitioner prepared and mailed Form I-290B, Notice of Appeal or Motion, on December 15, 2010. USCIS first received the form on December 17, 2010, but it did not include the correct fee as required by the USCIS regulation at 8 C.F.R. §§ 103.2(a)(1) and (7)(i). The petitioner did not properly file a motion until January 3, 2011, which was 47 days after the dismissal of the appeal. The USCIS regulation at 8 C.F.R. § 103.5(a)(1)(i) states that "[a]ny motion to reconsider . . . must be filed within 30 days of the decision that the motion seeks to reconsider."

The motion that the petitioner prepared in December 2010 included information about science fairs that his students had won in the past while the petitioner was teaching at the Neither the director's original denial nor the AAO's dismissal of the appeal rested on the lack of such evidence; the record contains multiple copies of these materials.

The AAO dismissed the motion on December 13, 2011, based on its untimely filing. The AAO did not address the merits of the motion at that time. On the cover page of the dismissal notice, the AAO advised the petitioner that any future motions "must be submitted to the office that originally decided [the] case."

The petitioner filed his second motion to reconsider on Form I-290B dated December 11, 2012. This date is likely incorrect, because the AAO had not yet dismissed the first motion on that date. The second motion arrived at the AAO on January 13, 2012, in an envelope showing the petitioner's own address, with ZIP code as the return address, but postmarked with ZIP code . The AAO returned the motion because it cannot directly accept filings. The petitioner properly filed the motion with the correct USCIS office on January 30, 2012. The petitioner submitted a January 23,

2012 letter from attorney who stated that a clerk at the law office had inadvertently mailed the motion to the wrong address.

In a statement accompanying the motion, the petitioner did not make any claims regarding the merits of his petition. Rather, his statement in his second motion was purely procedural in nature. The petitioner asserted that, on his first motion, he had overpaid rather than underpaid the filing fee, and therefore "USCIS and the government received its fee." The petitioner stated: "The Ninth Circuit has recognized that the overpayment of a filing fee should not result in the rejections of a notice of appeal."

The AAO dismissed the petitioner's second motion on August 2, 2012, partly because the appeal was untimely. The AAO also discussed the merits of the motion:

> Even if the motion were timely filed, the AAO would dismiss the motion to reconsider as deficient. The motion is based on the assertion that the AAO erred in its prior dismissal of the first motion to reconsider. . . .
>
> The petitioner asserts: "USCIS and the government received its fee. . . . The Government has not been deprived of its filing, such as [would be] the case where the check was returned unhonored by the bank, or no filing fee, or too little filing fee was submitted." The petitioner claims: "The Ninth Circuit has recognized that the overpayment of a filing fee should not result in the rejections of a notice of appeal. Lopez-Vega v. Keisler, 257 Fed. Apx. 47 (9th Cir. 2007) (unpublished)."
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> A notation in the decision states: "This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." *Id.* at 48. Therefore, the decision is not a controlling authority in the present proceeding. Even then, the decision does not say, as the petitioner claims, that "overpayment of a filing fee should not result in the rejections of a notice of appeal." Rather, the decision states that the government must justify such a rejection:
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> > With regards to the fee, the language of the rejection notice suggests that Lopez-Vega paid *more* than the amount due. We fail to understand how an overpayment would result in the rejection of a notice of appeal; none of the authorities cited by the government, including the administrative regulations, directs such a result.
> >
> > We therefore grant the petition for review, and remand to the BIA. Upon remand, the BIA shall *either*: (1) clarify with specificity the filing defects and the authority under which such defects would justify the rejection of the first notice of appeal and render the second notice of appeal untimely; *or* (2) deem the notice of appeal timely filed and conduct further proceedings accordingly.

> *Id.* at 49. An explanation of the filing defect, and the authority for rejecting the appeal based on that defect, would satisfy the above instructions. The USCIS regulation at 8 C.F.R. § 103.2(a)(7)(i) states: "A benefit request which is not . . . submitted with the correct fee(s) will be rejected." The regulation plainly requires not that the fee be "sufficient," which would refer only to underpayment. Rather, the fee must be "correct," neither underpaid nor overpaid. The petitioner, therefore, has not shown that the AAO erred in dismissing the prior motion to reconsider.

The petitioner filed the third and latest motion on August 30, 2012. On motion, the petitioner asserts that the AAO's instructions for filing a motion were vague and confusing, and therefore USCIS should not penalize the petitioner for filing a motion in the wrong location.

The petitioner's statement on motion addresses only the "untimely filing" part of the AAO's August 2, 2012 decision. As demonstrated above, the AAO's August 2012 decision also addressed the substance of the petitioner's second motion, finding that, on its merits, did not meet the requirements of a motion to reconsider. The petitioner has not addressed or rebutted this element of the August 2012 AAO decision, and therefore he has not shown that the decision was incorrect at the time of its issuance. Therefore, the petitioner's latest filing does not meet the requirements of a motion to reconsider, and the regulation at 8 C.F.R. § 103.5(a)(4) requires its dismissal.

In an undated statement that accompanies the latest motion, the petitioner indicates his wish to "submit a fresh appeal" so that documents that "went missing or got misplaced" can receive full consideration.

The petitioner states:

> I do not intend to re-forward to you all that has been mailed to the USCIS Texas office in the past but it is safer to give you the highlights of the gist of my application; the science fair especially that which relates to the research of bacteria, and my input of construction of a science curriculum, in the past and at present, that has been adopted by the College Board. . . .
>
> Although education in America is organized, largely, at the state level, nevertheless, there are some openings at national levels where individuals or team-work may demonstrate their talents. These include the and the , among others. Since I have made impressive representations in all these 3 areas, I provided the additional evidence relating to them.

The petitioner elaborates on these points. The petitioner discusses previously submitted evidence regarding the for Science Teachers. award 50 such grants each year to science teachers in the United States. The petitioner received one such grant in 2007, to finance a comparative study of watershed quality. In the 2010 dismissal notice, the AAO stated:

> While this project benefited the petitioner's students, school and community, this grant does not reflect on the petitioner's impact or influence in the field of science education. We reiterate that while the petitioner directed the project, he was not the principal writer on the grant. Regardless, the mere availability of this grant for review by members is not evidence of its ultimate influence on members. The record does not reflect that this project has served as a template for science projects nationwide or that the petitioner serves as a national mentor or guide in obtaining such grants.

The petitioner, on motion, discusses the issue of the writer credits on the grant application, but does not address the more fundamental issue of the funded project's influence on science education.

In the 2010 dismissal notice, the AAO acknowledged that the petitioner's students had performed well at science fairs such as the but the AAO stated:

> The fact that the petitioner's current and past students are or were motivated by the petitioner, however, does not demonstrate that he has a track record of success with some degree of influence on the field of science education. The work of his students, while not unrelated to his skill as a teacher, is primarily the students' work and does not establish the petitioner's influence on other science educators.

On motion, the petitioner contends that the students would not have been able to perform as well as they did without a mentor. The petitioner does not explain how his involvement in his students' science fair projects have influenced science education at a national level. (A one-time prize at a science fair does not establish or imply ongoing influence that will prospectively benefit the United States.)

With respect to the and its Advanced Placement (AP) examinations, the petitioner had previously stated that his students scored highly on the Environmental Sciences AP tests. The AAO, in its 2010 dismissal notice, stated that the petitioner cannot accurately compare his classes to the overall student population, because " does not have open admission." The AAO also asserted that the performance of the petitioner's own students on AP tests does not establish broader influence in the field of science education.

On motion, the petitioner states: "Although the school does not have an open enrollment, the same students do not perform as well in the other sciences." The petitioner also states: "the has created a forum where teachers whose syllabi have been approved exchange views with every

other teacher nationally." The petitioner does not establish that "every other teacher nationally" participates in the forum, or that significant numbers of teachers have adopted the petitioner's methods and/or curricula.

The petitioner states: "The nominated me to assist other teachers in a state sponsored AP-biology program that has raised the state of Alabama to feature as one of the most improved states in the nation." The petitioner submitted a printout from the web site, encouraging teachers to "[a]pply to become part of a team of talented and committed AP teachers and share strategies, advice, and resources within a collegial environment." The printout does not indicate that the university "nominated" the petitioner for the program. Rather, the printout is an open call for applications. Also, the same printout did not indicate that the university chose participants based on their achievements as teachers, or that participants would shape teaching methods and/or policy. Rather, the printout stated:

> The AP Instructional Team Program will provide teachers in Alabama with a support network they can draw upon to maintain the competitive standards. . . . Selected teachers will be organized in up to five groups per discipline, with each group led by an experienced, well-trained, and highly successful AP teacher. The Team Leader will serve as the key teacher for each group. . . .
>
> The AP Instructional Team Program will provide teachers with the opportunity to
>
> - work collaboratively with the College Board's leading subject area consultants, sharing instructional resources, professional practices, and academic insights
> - incorporate the most current research, technology, and scholarly information into their discipline
> - utilize cutting-edge technological resources available through the
> - Improve the quality of Advanced Placement instruction throughout the State of Alabama

The submitted materials indicate not that the sought the petitioner's assistance in shaping science education, but rather that the university provided instruction to selected teachers in order to enhance the abilities of those teachers. The program would "[i]mprove the quality of Advanced Placement instruction" not by having selected teachers redesign the state curriculum, but by helping those teachers to improve their own teaching skills by "incorporat[ing] the most current research, technology, and scholarly information into their discipline." The materials do not indicate that the petitioner was one of the program's team leaders. In an August 14, 2008 electronic mail message to one of the program officials, the petitioner stated: "I do not think that I will need another training at moment, I have attended four or more such trainings already."

Witness letters attest to the petitioner's contributions to various schools where he has worked, and certificates support some of the petitioner's claims regarding science fairs, grants, and other matters.

The petitioner has not established that the AAO erred in its August 2, 2012 decision, or in any prior decision.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The motion is dismissed.